Supreme Court, U.S.
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In The

Supreme Court of the United States

CLEM ABRAMS and JOHN BOHANNON,

Petitioners,

v.

CITY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The State Of California, Fourth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an intermediate California appellate court be permitted to tamper with the core language of the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (acquiesced in by the California Supreme Court in *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 860 (1996)), the terms of which have become uniform and well-settled throughout Takings Clause Jurisprudence, so as to pervert the true and intended meaning of this important test and allow local government and its developer cohort to engage in chicanery to deny owner just compensation for the taking of his land, thereby forcing this owner alone to bear public burdens which in all fairness and justice should be borne by the public as a whole? *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

2. May the California state courts be allowed to avoid (indeed, stand on its head) the true and intended meaning of the "rough proportionality" test of *Dolan v. City of Tigard* by the disingenuous artifice of eliminating therefrom the words "impact of the project" and substituting the word "benefits" in their place whenever they purport to apply and conform to *Dolan's* "rough proportionality" standard, so that, to owner's loss, the new, made up, California rendition of the *Dolan* test reads: "the *Dolan/Nollan* test requires that the assessment be roughly proportional to the *benefit* received by the property"? [App. 12]

3. May a local government successfully circumvent the rough proportionality requirements of *Dolan v. City of Tigard* and take private property without paying just compensation, simply by contriving a so-called Cost Reimbursement District, relying on obsolete (pre-*Dolan*) state law, to accomplish indirectly what it could not justify directly, that is to take owner's property without

QUESTION PRESENTED

paying just compensation, a process which one highly regarded California jurist described as "a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location," where the local government agency first "puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket"? The City and its cohort did exactly that in this case.

4. Was the California courts' mendacious substitution of the word "benefits" in place of "the impact of the project" in purporting to apply the rough proportionality test of *Dolan v. City of Tigard*, an intolerable violation of settled federal constitutional law, requiring reversal of the judgment of the California courts and issuance of an order requiring entry of judgment in favor of Property Owners, so their 13-year quest for constitutional justice may finally be concluded?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners and Petitioners below are Clem Abrams and John Bohannon ("Property Owners") as individuals. Respondent and Respondent below is the City of San Diego ("City"), a California Municipal Corporation. Mesa Shopping Center East, whose interests may be affected by the outcome of this case, is appearing as a Real Party in Interest.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND FEDERAL COMMON LAW PROVISIONS	1
STATEMENT OF THE CASE	2
A. Factual Background	3
B. Procedural Background	12
REASONS FOR GRANTING THE PETITION	15
I. THE COURT OF APPEAL ERRED IN EQUATING "BENEFIT" WITH "ROUGH PROPORTIONALITY" AS A BASIS FOR TAKING PROPERTY WITHOUT JUST COMPENSATION	18
II. THE COURT OF APPEAL ERRED ON HOLDING THAT FAILURE TO OBJECT TO THE INITIAL ASSESSMENT WAIVES SUBSEQUENT OBJECTIONS TO CHANGES IN THE PROJECT OR INCREASES IN THE ASSESSMENT	19
III. THE COURT OF APPEAL ERRED IN AFFIRMING THE USE OF APPRAISAL REPORTS TO DEMONSTRATE MARKET VALUE INCREASE AS A BASIS FOR A FINDING OF "BENEFIT."	21

TABLE OF CONTENTS

Page

IV. THE COURT OF APPEAL ERRED IN DECLINING TO CONSIDER THE TRAFFIC EFFECTS INVOLVED IN REAL PARTIES DEVELOPMENT AS THE PROPER LOGICAL BASIS FOR ROUGH PROPORTIONALITY ANALYSIS 22

V. THE COURT OF APPEAL ERRED IN USING "BENEFIT" AS A BASIS FOR PROPORTIONALITY DETERMINATION AS OPPOSED TO "THE EFFECTS OF THE PROPOSED DEVELOPMENT" AS MANDATED BY *DOLAN* AND *EHRLICH*, RESULTING IN INJUSTICE 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

California:

Ehrlich v. City of Culver City, 12 Cal.4th 854 (1996) ..... *passim*

White v. County of San Diego, 26 Cal.3d 897 (1980) 6, 15, 24, 25

Federal:

Armstrong v. United States, 364 U.S. 40 (1960) 17

Dolan v. City of Tigard, 512 U.S. 374 (1994) ..... *passim*

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 16

CODES:

Federal:

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2101(c) 1

California:

Code of Civil Procedure, sections 1230.010, *et seq.* 5

Gov. Code, § 66000, *et seq.* 18

San Diego Municipal Code § 62.0208 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

United States Constitution, Article VI, Clause 2 ..... 1, 25

United States Constitution, Fifth Amendment 1, 16, 18

United States Constitution, Fourteenth Amendment 1

Sup. Ct. R. 13.1 1

OPINIONS AND ORDERS BELOW

The unpublished memorandum opinion of the California Court of Appeal, Fourth Appellate District, affirming the denial of a Supplemental Petition for Writ of Mandate below, dated October 29, 2002, is reproduced in Petitioners' Appendix A. The unpublished order of the California Supreme Court, denying Property Owners' petition for review, dated January 22, 2003 concluded the liteny of appellate activity on this case. It is reproduced in Petitioners' Appendix E. But for this Petition, the case is final in all respects.

JURISDICTION

This Court has jurisdiction to review the judgment by a writ of certiorari pursuant to 28 U.S.C. § 1257(a) (1988). The order of the California Supreme Court denying Property Owners' petition for review was entered on January 22, 2003. This petition is therefore timely pursuant to 28 U.S.C. § 2101(c) (1988) and Sup. Ct. R. 13.1.

CONSTITUTIONAL AND FEDERAL COMMON LAW PROVISIONS

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution are implicated. This Court's decisions establishing the federal common law that limited land use exactions by municipalities to avoid paying just compensation through eminent domain are relevant. *Nollan v. California Coastal*

Comm., 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), are the lead cases.

STATEMENT OF THE CASE

This is a case where the City cooperated with MSCE, a shopping center seeking to expand, in the formation of a cost reimbursement district for the purpose of enabling MSCE to fund the road and drainage infrastructure necessary to serve the shopping center's pending expansion project with the understanding that it would thereby obtain reasonable reimbursement for public improvements to be used by others, such as Property Owners, when and if their property ever developed. Two assessments resulting in liens against Property Owners' undeveloped property were made under this district, totaling over $950,000.00, such that if Property Owners sought to pull a building permit for work valued over $20,000.00, such lien would have to be paid. These original two assessments are not at issue in this case, since Property Owners, for various reasons, chose not to challenge those assessments.

Thereafter, the City determined to condemn a right of way for a major street right through the middle of Property Owners' undeveloped property, as depicted in the drawing reproduced in Petitioners' Appendix-78 [hereinafter Appendix is "App."], paid a condemnation award, and then sought to charge the full amount of the condemnation

award and expenses back as a recorded lien against Property Owners' property.[1]

This was done on the apparent (but erroneous) theory that if Property Owners had desired to develop their property before MSCE, they would have been required to dedicate (without compensation) the same property for roadway purposes. In sum, City handed Property Owners $440,000.00 over their original estimate for the right of way, and then took over $546,000.00 back through the Addendum to the Assessment, by amending and increasing the lien on their property.

Naturally, Property Owners objected, and filed *Abrams v. City of San Diego*, case number 655468 in the Superior Court of California, County of San Diego, Central Division, seeking a Writ of Mandate to force the City to rescind the assessment.

A. Factual Background

In this case Property Owners, owners of a nine-acre parcel of property in the Mira Mesa area of the City of San Diego, had the misfortune to be located directly adjacent to a 23.8 acre parcel owned by MSCE.

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[1] The details are somewhat complicated because as part of the road project, some drainage improvements to the remainder of Abrams' property were completed. At the end of the day, the monies Abrams received from the City for street right of way had been recouped by the City by a commensurate lien against Abrams' remaining property.

Property Owners had no present intention of developing their property. MSCE, on the other hand, had immediate intentions to subdivide and expand its shopping center, and in furtherance of that goal sought to obtain approval of a subdivision map.

Part of the subdivision map review process involved an analysis of the on site and off site physical improvements required for the project. In this case, City officials determined that Mira Mesa Boulevard needed to be widened, Galvin Avenue needed to be widened, and a new major street, ultimately called Westview Parkway, needed to be constructed.

MSCE obtained approval of its tentative subdivision map with a number of conditions which included the improvements to Mira Mesa Boulevard and Galvin Avenue, and the construction of Westview Parkway.

When the project was proposed, there were two potential alignments for Westview Parkway and Galvin Avenue. One followed the property line between Property Owners' and MSCE's respective properties, and the alternate would be largely on Property Owners' property, consuming approximately two of the nine acres, and cutting Property Owners' property up into three pieces, one of which would abut MSCE's property, and another of which would be virtually useless because of its small size. [App.-78]

The record contains no evidence as to why the alternative alignment was selected, but as this matter has evolved, a significant reason has become apparent.

The City of San Diego has developed a pattern of circumventing the eminent domain process for the acquisition of private real property for public use in exchange for just compensation, as contemplated in Title 7 of the California Code of Civil Procedure, sections 1230.010, *et seq.*, by either requiring dedications or exactions in the land use process, or if the person or entity from whom the property is to be taken is not a current applicant for permission to develop, by proclaiming that the property is "benefitted" by the development such that an assessment lien can be placed upon it.

In this case, the vehicle for the creation of the assessment lien was a "cost reimbursement district," pursuant to which the City of San Diego required the developer, MSCE, "front" the cost of the improvements, including Westview Parkway and Galvin Avenue, with the understanding that Property Owners and other property owners in the area would be required to "reimburse" MSCE for a portion of those costs. These reimbursements, sometimes called "exactions", would be in the form of liens on the properties, payable if any development application over $20,000.00 were submitted at any time within the next twenty years. The liens increased by accrual of seven per cent interest, compounded annually.

An additional aspect of the policies of the City of San Diego is that somewhere along the line a custom evolved, which was that it could be assumed, without further analysis, that any property that suffered a condemnation of any portion thereof for road improvements was "benefitted" by the portion of the road improvements located on

that property.[2] One could reasonably speculate this "assumption" arose from, among other things, the case of *White v. County of San Diego*, 26 Cal.3d 897 (1980), wherein the California Supreme Court upheld an assessment against property owners on either side of Mission Gorge Road for improvements to the road consisting of widening and the installation of medians and signals. In that case, the Supreme Court specifically approved of an approach which surcharged those properties whose frontages were taken by condemnation but did not charge those properties whose owners dedicated their frontage strips.

Unfortunately, somehow officials of the City of San Diego and the land use development consultants who work with them allowed the holding in *White* to be translated into a "rule of thumb," hereinafter referred to as the "unfounded allocation presumption," that if real property was condemned for road purposes leaving a remainder parcel, the remainder parcel was "benefitted" to the extent of the cost of the condemnation, and the proportion of the cost allocable to the remainder parcel was that represented by the portion taken compared to the portion taken from the adjoining property.

Put another way, if the center of the new road goes down the property line between two properties, they share the cost equally, but if the road is fully on the property of one property owner, going down the edge adjacent to the other property, the property owner upon whose property

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[2] An assumption not supported by reality as the Court can see from the geometry of the property here. See, App.-78. Here, it is seen that the MSCE expansion was a great detriment not a benefit.

the road is built bears the entire cost of site acquisition and development regardless of the geometry of the road design. This approach is not only illegal generally, but, as will be shown herein, is in direct violation of the City Council's own Policy 200-1.

Earlier MSCE took the position in the California state courts that the aforementioned "unfounded allocation presumption" results in the "proportionality" required by the Fifth Amendment of the United States Constitution as described in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), such that no further demonstration of proportionality need be made.

In this case, that meant that if MSCE was shrewd enough to cause the alignment of Westview Parkway and Galvin Avenue to veer entirely onto Property Owners' property, MSCE could avoid having to pay for Westview Parkway and Galvin Avenue and save the other property owners in the cost reimbursement district from sharing in this expense. The City of San Diego cooperated fully with MSCE's plan, in violation of its own policy, number 200-1.

In connection with MSCE's expansion, the MESA SHOPPING CENTER EAST COST REIMBURSEMENT DISTRICT NO. 4045 ("the DISTRICT") was purportedly formed and implemented in 1990 pursuant to San Diego Municipal Code § 62.0208. This process generally permits the first developer of property to fund the construction of public improvements benefitting not only that property, but other adjoining property and to secure a claim for proportionate reimbursement from other benefitted owners, if and when they develop.

Once the project was underway, MSCE and City decided that Westview Parkway and Galvin Avenue should be entirely within the confines of Property Owners' property, resulting in a division of the property into two small parcels and one larger parcel. In July of 1990, MSCE requested that additional costs be charged to Property Owners' property, increasing their total cost to $998,299.00. Property Owners also did not object to this first amendment, which included a budget for $200,750.00 for acquisition of right-of-way across Property Owners' property, and a budget for the installation of a major storm drain across Property Owners' property (as dictated by MSCE's subdivision map).

The effect of this was that the cost reimbursement district was formed, and "exactions," in the form of liens placed on Property Owners' property were made, first in the amount of $570,948.00 and then increased to the total amount of $998,299.00. Because of various circumstances, Property Owners did not legally attack these two exactions.

Property Owners had not been seeking to develop their property, so City could not use its usual tactic of requiring dedication of the road right-of-way as it passed Property Owners' property.[3] The only way City could obtain the right-of-way of Westview Parkway and Galvin Avenue that would occupy some 25% of Property Owners' property, in a time frame suitable to MSCE, was to condemn it. This

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[3] Such a dedication would not have passed constitutional muster in any event, given the ultimate alignment the CITY chose for the road, which was entirely inside the property and consumed approximately 25% of its area.

condemnation was litigated in state court, resulting in an award of $641,358 to Property Owners.

In June 1992, City held a hearing on the increased cost and its allocation among the Property Owners. Property Owners opposed the change of plans and the resulting proposed increase by letter and at the hearing. At the hearing, Property Owners sought a continuance which was denied, and the city council, with one dissenting vote, approved the amendment to the cost reimbursement assessment against Property Owners.

Property Owners therefore sought a Writ of Mandate, for the purpose of causing City Council to conduct a full and fair hearing as to the issue of whether Property Owners were being liened to an extent disproportionate to the impact on their property.

Ultimately, the trial court disagreed with City's approach as to proportionality, ruling that it was up to City of San Diego to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the cost reimbursement district on June 23, 1992 and the exaction with which Property Owners had taken issue.

MSCE appealed, and this Court affirmed that determination, in case number D029343.

The effect of the Opinion in D029343 was that City Council would be required to hold a proper hearing on the question of the proportionality of the benefits related to the exaction, so as to create a record permitting judicial review of that question, if necessary.

The Opinion stated, at 11:

> To impose a cost reimbursement lien on Property Owners's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council. [App.-32]

City then scheduled another hearing on the question of the amended third exaction, Property Owners specifically took issue with the question of proportionality.

On June 19, 2000, the City Council held its regular meeting, which included, as item 205, "Addendum to the Mesa Shopping Center East Cost Reimbursement District Agreement" with a City Manager's recommendation to adopt a resolution "[r]e-affirming [sic] that a factually sustainable proportionality exists between the June 23, 1992 amendment to the Mesa Shopping Center East Cost Reimbursement District and the benefit to the Property Owners/Bohannon property."

Property Owners were allowed two minutes on the record, the transcript of which only takes up two pages, and City adopted the resolution, based on a report from a "public finance consultant," (the "Fournier Report") which included a purported engineering analysis and an appraisal of the land. The Fournier Report contained a purported "benefit analysis" involving only Property Owners' property, which concluded with the opinion that the value of Property Owners' property had risen based on the "improvements" hence had been benefitted.

City's consultant noted that this condemnation award was $440,000.00 more than the budget as of the first amendment. This consultant, Fournier, then sums up what City did:

> Accordingly, on April 20, 1992, the cost reimbursement engineer, Wildan Associates, prepared and submitted its report regarding the final cost of improvements and right-of-way acquisition, and proposed spreading the costs that had increased from that which was estimated at the time of the first amendment to the cost reimbursement district. It had by that time been determined that the cost of right-of-way acquisition, including attorney's fees and other litigation expenses, was $696,905.66, of which $641,358 was the right-of-way compensation agreed to be paid and actually paid to the owners of the Property Owners/Bohannon parcel. This represented a total increase of $496,000 from the estimate for right-of-way acquisition costs which was used at the time of prior amendment to the reimbursement district. **This *entire amount*, together with approximately $49,000 of the increase in overall improvement costs experienced by the district, was then assessed to the Property Owners/Bohannon parcel by an amendment to the district passed by the City Council on June 23, 1992.** [Emphasis added.]

At the June 19, 2000 hearing, the additional lien was approved with no record whatsoever containing an actual demonstration of any sort of calculation regarding proportionality as between the various properties benefitted by the Westview Parkway and Galvin Avenue improvements.

Property Owners therefore filed a Supplemental Petition for Writ of Mandate, seeking to have the trial court tell City that it had used the wrong standard. The trial court denied the Supplemental Petition, holding:

> The Court of Appeal's Opinion does not require a calculation of the traffic that petitioners' parcel might someday generate. The better way to identify benefit is to determine what a willing buyer would pay for the property before and immediately after the improvements were constructed, as the City has done. Using this standard of proportionality, the record establishes a substantial evidence of proportionality. . . . Nor has a procedural due process violation been shown. . . .

This Appeal timely followed.

B. Procedural Background

Property Owners first filed their lawsuit on August 24, 1992, seeking to invalidate the third exaction. Initially, the trial court denied the petition, and after an appeal on procedural issues having to do with the Statute of Limitations, in case number D019566, this matter was remanded to the trial court by the Court of Appeal with directions to address the administrative mandamus petition on the merits.

On June 30, 1997, the trial court entered a judgment which found, among other things,

> 1. There is no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was rough proportionate benefit to the parcel; . . . [App.-22]

The trial court then ordered, adjudged and decreed:

> That a peremptory writ of mandate shall issue under the seal of this court commanding respondent, the City of San Diego, including all its agencies, departments, subdivisions, officers, employees, and agents, within the time specified for a return to the writ to demonstrate a factually sustainable proportionality between the effects of the increased costs of $545,251.18 assessed through the Cost Reimbursement District on June 23, 1992, and the exaction. [App.-23]

MSCE appealed, and in case number D029343, the Fourth District Court of Appeal, Division One, affirmed.

The response to this appeal by the City has been described on page 10.

Property Owners then timely filed a Supplemental Petition, which was denied, on March 30, 2001. [App.-35, 36]

Property Owners then filed this Appeal, case number D038402.

In an unpublished Opinion, on October 24, 2002, the Court of Appeal affirmed the judgment of the trial court [App.-1-21], on the basis of four fundamental concepts:

1. At page 12, the Opinion states "the *Dolan/Nollan* [*Dolan v. City of Tigard*, 512 U.S. 374 (1994)/*Nollan v. California Coastal Commission,* 483 U.S. 825 (1987)] test requires that the assessment be roughly proportional to the **benefit** received by the property." (Emphasis added.) There is no previous decisional law support for this conclusion. The Opinion effectively concedes it made up the new rule.

2. At page 14, the Opinion states "Because Abrams' timely-filed petitions challenged only the June 1992

increase in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants. Both *Dolan* and *Ehrlich* [*Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996)] deal with each separate assessment individually.

3. At page 17, the Opinion, in reference to the City's reference to the Tagg Appraisal and the Fournier report, states "In so doing, City made the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to owners' property) of the district improvements" citing *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard*, 512 U.S. 374, at 391, 395-96 (1994). Any financial "benefit" attributable to the right-of-way acquisition was properly the subject of the eminent domain action, such that any such analysis had already been waived by the earlier settlement. Moreover, neither *Dolan* nor *Ehrlich* mandate the unilateral use of appraisal opinions as a basis for exactions.

4. The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on Westview Parkway and Galvin Avenue" noting that Property Owners did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made. However, neither the Opinion nor

the briefing by City or Real Party provide any previous decisional authority that contradicts this view, and, in fact, it demonstrates misapplication of City Policy 200-1 at footnote 8, which distinguishes between-types of uses of road improvements.

After the Court of Appeals denied Property Owners' Petition for Rehearing, Property Owners timely petitioned the California Supreme Court for Review on December 6, 2002. [App.-95-122] The state supreme court denied the petition on January 22, 2003 (Justice Brown being of the opinion that the Petition should be granted), leaving Property Owners with the present petition for a writ of certiorari to the California Court of Appeal as their sole remaining recourse. (Order Denying Petition for Review reproduced in Petitioners' App.-37.)

REASONS FOR GRANTING THE PETITION

A grant of certiorari is necessary in this case to answer the question of whether a public agency can exercise eminent domain powers to take real property interests, and then either pay no compensation or "assess" back the acquisition cost to the property owner, based on a contention that the project for which the taking is effectuated is a "benefit," without violating the prohibition found in the Fifth Amendment of the United States Constitution against the taking of property without the payment of just compensation as described by *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In his dissent in *White v. County of San Diego*, *supra*, 26 Cal.3d 897, the late Justice Mosk, a highly regarded

California jurist with decades of service on the California Supreme Court, made the following comment, at 910:

> The county's scheme is a cynical method of automatically shifting the cost of an improvement benefitting the public onto the backs of a few landowners because of the fortuity of their location. Not only do the landowners lose a portion of their property, but they are then deprived of the constitutionally required compensation for the taking. (Cal.Const., art. I, § 19.) I strongly disapprove of this acquisitive device by which a public entity, in order to obtain private property, puts funds therefor in a landowner's pocket – and then proceeds to pick the pocket. [App.-87]

In *Ehrlich*, the California Supreme Court embraced a metaphor, similar to the one in frequent use by the United States Supreme Court, as follows:

> One of the central premises of the takings clause is that truly public burdens will be publicly borne . . . the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposition of conditions that lack any logical affinity to the public impact of a particular land use. (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 876.) [App.-87]

Please see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001):

> The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

> public as a whole.'" *Penn Central, supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

The most egregious aspect of this whole proceeding, however, is the fact that in contrast to the property owners in *Nollan, Dolan,* and *Ehrlich,* Property Owners have never been applicants for any project that would have justified any taking of their property, much less dramatic strips out of the middle of their property "for its benefit." The decisions to shift the right-of-way rested solely with MSCE and the City, which rightfully should bear the expense of the street.

As noted, the Court of Appeal Opinion in this case appears to hold that so long as a public agency can get an appraisal that indicates the property owners' remaining property interest has increased in value, compensation need not be given for the taking of real property, or if it is, it can simply be "assessed" back. The Court, therefore, should grant the requested writ of certiorari to establish that no taking of real property for public benefit may be had without payment of just compensation, such that public agencies, such as the City in this case, cannot require dedications or take rights of way without paying for them, under the guise of benefitting the abutting property owner.

I. THE COURT OF APPEAL ERRED IN EQUATING "BENEFIT" WITH "ROUGH PROPORTIONALITY" AS A BASIS FOR TAKING PROPERTY WITHOUT JUST COMPENSATION.

In *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, the California Supreme Court summarized the current law of California this way, at 859:

> As we explain, we conclude that the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining whether a compensable regulatory taking has occurred under the takings clause of the Fifth Amendment to the federal Constitution apply, under the circumstances of this case, to the monetary exaction imposed by Culver City as a condition of approving plaintiff's request that the real property in suit be rezoned to permit the construction of a multi-unit residential condominium. We thus reject the city's contention that the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies only to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval.
>
> We arrive at this conclusion not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act. ([California] Gov. Code, § 66000 et seq.) We will conclude in this case that, in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the act, the tests formulated by the high court in its *Dolan* and *Nollan* opinions for determining when a regulatory taking has occurred apply here to the act's

> requirement that the local regulatory authority demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development.
>
> We thus interpret the act's "reasonable relationship" standard, as applied to the development fee at issue in this case, as embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions – proof by the local permitting authority of both an "essential nexus" or relationship between the permit condition and the public impact of the proposed development, and of a **"rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development.** (Emphasis added.)

The "benefit" test described at page 12 of the Court of Appeal opinion in this case is simply not the same as the test described in *Ehrlich* which refers to "effects of the proposed development." The Court of Appeal flat out made up a new rule which is not supported by current legal authority and is plainly in conflict with *Dolan* on the Federal level, and *Ehrlich* in California.

II. THE COURT OF APPEAL ERRED ON HOLDING THAT FAILURE TO OBJECT TO THE INITIAL ASSESSMENT WAIVES SUBSEQUENT OBJECTIONS TO CHANGES IN THE PROJECT OR INCREASES IN THE ASSESSMENT.

The record reflects that when the original assessment district was implemented and the first supplemental assessment was initiated, the right-of-way went alongside, as opposed to through, Property Owners' property.

However, at page 14, the Opinion states "Because Property Owners' timely-filed petitions challenged only the June 1992 *increase* in the amount of the costs reimbursement . . . he effectively waived any argument that those district improvements did not benefit his property or were otherwise proper." Again, there is no previous decisional law support for the conclusion that if the initial assessment is not challenged, the public agency has *carte blanche* to make whatever project changes and further assessments it deems appropriate without any risk of legal challenge. As logic and sound public policy would dictate, just the opposite is true. Project changes, in all fairness, must re-open the public's right to challenge – lest the fox have an open door to the henhouse. In California, perhaps the best example is the administration of the California Environment Quality Act. Re-opening on charges in common. In this case, the project was changed after the first two assessments to shift the burden of the right-of-way entirely onto Appellants.

The Opinion fails to account for the fact that after the second assessment, at the request of MSCE, the project was changed, to shift the right-of-way from the boundary between MSCE's and Property Owners' respective properties, **entirely onto Property Owners'** property, as depicted in the drawing incorporated into Appellants' Reply Brief, reproduced in Petitioners' App.-98.

III. THE COURT OF APPEAL ERRED IN AFFIRMING THE USE OF APPRAISAL REPORTS TO DEMONSTRATE MARKET VALUE INCREASE AS A BASIS FOR A FINDING OF "BENEFIT."

At page 17, the Opinion purports to find that the City made the required individualized determination regarding the degree of connection between the exaction imposed (e.g., the cost reimbursement lien) and the projected impact (e.g., benefit to Property Owners' property) [sic] of the district improvements, erroneously citing *Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, 879-880; and *Dolan v. City of Tigard*, *supra*, 512 U.S. 374, at 391, 395-96.

As an initial matter **the substitution of the word "benefit" for "effects of the development"** on the basis of the fact that Property Owners were not seeking approval of a project is entirely unsupported by any statutory or case law, and the Opinion cites none. Patently, there is and could be no honest justification for such sleight of hand when Property Owners' property was seized by eminent domain, but through this ruse perpetrated by the City, Property Owners were denied just compensation.

No reported case refers to, much less mandates, the unilateral use of appraisal opinions as a basis for exactions.

A review of the record shows that the sole basis for the finding of benefit to Property Owners was the opinion of Randy Tagg, an appraiser, that the property had been enhanced in great value by the totality of the improvements including both the prior two assessments and the second increase, without segregating one from another.

The Opinion provides no legal authority to support the proposition that an appraisal opinion indicating an enhancement of *market value* of the Property Owners' property, standing alone, is a sufficient basis for a finding of rough proportionality. After all, in California it is very common for market values to increase (or decrease) significantly, and abruptly, from time to time for reasons wholly unrelated to public improvements, i.e., pure market conditions, the economy, employment, foreign crisis, etc. A general appraisal is a poor indicator of the impact of one isolated growth factor.

The Opinion beginning at page 17 entirely accepts, without question the Tagg appraisal, and entirely omits to consider that such appraisal was not grounded in the reality of an actual development proposal, as opposed to speculation as to what the City might or might not approve. Perhaps more importantly, in a normal taking case where appraisal testimony is taken, it is tested through cross-examination and the defense opinion testimony. In this case the record makes clear that there was no discussion of the sense or underpinnings of Tagg's appraisal testimony at all, since the proceedings were nothing more than a "rubber stamp" exercise.

IV. THE COURT OF APPEAL ERRED IN DECLINING TO CONSIDER THE TRAFFIC EFFECTS INVOLVED IN REAL PARTIES DEVELOPMENT AS THE PROPER LOGICAL BASIS FOR ROUGH PROPORTIONALITY ANALYSIS.

The Opinion states, at 18, that "City was not required to apply the rough proportionality test based on evidence regarding current and/or projected vehicle traffic on

Westview Parkway and Galvin Avenue" noting that Appellant Property Owners did not cite any case law supporting the idea that rough proportionality of exaction should be based on relative use of the improvements for which the exaction is made.

However, neither the Opinion nor the briefing by City or MSCE provided any previous decisional authority that contradicts this view, and, in fact, the Opinion demonstrates misapplication of City Policy 200-1 at footnote 8, which distinguishes between types of uses of road improvements.

The Opinion appears to assume that the strip of Westview Parkway and Galvin Avenue that trisected Appellants' property was "the portion of the street system which provides for local traffic movement and access to abutting property" as opposed to:

1. Streets which facilitate the movement of through traffic, or serve in a collector function and are of benefit to the general area as to which, pursuant to Council Policy number 200-1, "this community should share in the costs" or

2. Features which expedite the movement of large volumes of traffic or which provide major service for other areas are of general benefit to the City which, pursuant to Council Policy number 200-1, "merit funding from tax sources."

Absent consideration of a traffic study, it would not be possible for the City to figure out how a road improvement should be financed. When there is doubt about the specific proportion of use between the public and the property

owner, it should be in favor of public funding, not assessments of individual property owners in amounts unrelated to their use of the resulting streets.

When one compares the 696 Average Daily Trips[4] that would be attributable to the 87 maximum residential units on Appellant Property Owners' property, with the 25,000 Average Daily Trip cap, and the 8,000 existing Average Daily Trips as of April, 1998, the idea that 696 trips, which are, per the record, 8.7% of current, and 2.8% of projected trips should account for 100% of the right-of-way cost is absurd.

One would think logically that a comparison of street usage between the subject properties, the properties in the district, and the general public would be necessary for any determination of proportionality. The Opinion nowhere describes how City satisfies the mandate of *Ehrlich*: " . . . proof by the [City] . . . of a 'rough proportionality' between the magnitude of the fiscal exaction and **the *effects* of the proposed development.**" (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th 854, at 859, emphasis added.)

The Opinion itself even cites a passage from *White v. County of San Diego*, *supra*, 26 Cal.3d 897, 904 "Property may be specially assessed only for improvements that provide it benefits beyond those received by the general public." Absent consideration of traffic patterns, no legitimate determination of the benefit of a road improvement

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[4] Average Daily Trips per Dwelling Unit times the number of expected dwelling units (or other users) is the fundamental yardstick for design of circulation systems in City.

can be made, hence the Court of Appeal was entirely in error.

V. THE COURT OF APPEAL ERRED IN USING "BENEFIT" AS A BASIS FOR PROPORTIONALITY DETERMINATION AS OPPOSED TO "THE EFFECTS OF THE PROPOSED DEVELOPMENT" AS MANDATED BY *DOLAN* AND *EHRLICH*, RESULTING IN INJUSTICE.

The Court of Appeal's slippage into "benefit" terminology at page 10 of its earlier March 6, 2000 Opinion and in the entirety of its October 29, 2002 Opinion is simply not faithful to the mandates of *Dolan*, *supra*, or even *Ehrlich*, *supra*. The Court of Appeal accurately **quoted** the *Ehrlich* mandate at the bottom of page 9 and the top of page 10 of the March 6, 2000 Opinion [App.-31] as ". . . agency must prove . . . a 'rough proportionality' between the magnitude of the fiscal exaction and the **effects** of the proposed development," (emphasis added) and then without explanation segued to the outdated "benefit" language of the abrogated *White* case, which apparently has now become the foundation for the decision in the current Opinion. [App.-31 (middle paragraph)]

While it does not appear that *White* has yet been expressly disapproved, its bald conflict with the more recent trio of cases is patent, and this is the time for its demise. In *Ehrlich*, the California Supreme Court embraced the Supremacy Clause (Article VI of the United States Constitution) as never before in land use matters, and the supremacy of *Dolan/Nollan* is beyond doubt.

The Opinion notes that *Ehrlich* held ". . . when [government] imposes special, discretionary permit conditions

on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th 854, at 881.)

Despite the recitation of the heightened scrutiny standard, the Court of Appeal erroneously declined to actually apply it, and instead, at least as to San Diego County, reaffirmed the current policies that allow the taking of real property without compensation from property owners who are not land use applicants, based on notions of "benefit" rather than "effect" which do not involve comparison to the public benefit from the taking.

Finally, Property Owners submit that a writ of certiorari is appropriate even though the case is not published because it is clear that many public agencies with eminent domain power are aware of the position of the Court of Appeal that is described in its opinion, and are, on a daily basis, making "taking" decisions based on the very analysis upon which it relies, in violation of the constitutional rights of persons such as Property Owners.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari in this matter.

The "benefit" duplicity employed by California local government and utter disregard for the principles of *Dolan* are in full swing. Many other landowners are being denied their constitutional rights. This Court will never find another case like this that plainly demonstrates the evils

in play. The schemes grow more complex. Now is the time to rein in the abuses.

Dated: April 22, 2003

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Page

A OPINION, COURT OF APPEAL, 10/29/02 [Appeal 4 Civil D038402]..... App. 1

B FINAL JUDGMENT GRANTING PETITION FOR WRIT OF MANDATE, 6/30/97 [Prior appeal 4 Civil D029343]..... App. 22

C OPINION, COURT OF APPEAL, 3/6/00 [Prior Appeal 4 Civil D029343]..... App. 24

D ORDER DENYING PETITIONERS' SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS, 3/30/01..... App. 35

E DENIAL OF PETITION FOR REVIEW BY CALIFORNIA SUPREME COURT, 1/22/03 [Appeal 4 Civil D038402/S111918]..... App. 37

F OPENING BRIEF, COURT OF APPEAL, 1/2/02 [Appeal 4 Civil D038402]..... App. 38

G REPLY BRIEF, COURT OF APPEAL, 4/30/02 [Appeal 4 Civil D038402]..... App. 75

H PETITION FOR REVIEW, CALIFORNIA SUPREME COURT, 12/6/02 [Appeal 4 Civil D038402/S111918]..... App. 95